STATE OF CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
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November 20, 1985

AGENDA ITEM 22

TO: MEMBERS OF THE BOARD OF ADMINISTRATION

SUBJECT: Implementation of New Administrative Hearing Procedure

At the September 18, 1985 Board of Administration meeting, the Board was informed that Formal Opinion No. 1984-82 of the Standing Committee on Professional Responsibility and Conduct of the State Bar of California required a change in the Board's administrative hearing practice and approved an interim procedure. A copy of that agenda item is attached.

As previously indicated, the Attorney General's Office was notified of the proposed interim procedure and stated that it was reviewing the entire matter. That office has informed us that it does not plan, at this time, to issue any formal guidelines respecting the matter because it does not find it to be necessary.

The Legal Office has identified seven alternatives for handling proposed decisions before the Board at Board meetings. The alternatives are as follows:

1. No communication from staff counsel, staff, or the other side. The Board would have only the proposed decision to consider when deciding whether to adopt or not adopt the proposed decision.

   This alternative is not recommended because the Board would have very little information upon which to base a decision. The System's practice or the law may be contrary to what is stated in the proposed decision, and the Board would not have sufficient information.

2. Same as number 1 above, but also give the Board the pleadings and evidentiary documents.

   This is not recommended because it could be misleading because the Board would not have the testimony regarding the documents and it seems to defeat the purpose of having an administrative law judge hear the case. We could not give the Board a copy of the transcript of the hearing at this time because the proposed decision must be acted upon within 100 days of receipt and we often do not receive the transcript within 100 days of our request.

3. Written argument from each party submitted to the Board at the same time, with no oral argument.

   We recommend this alternative. It provides the Board with needed information and argument from both parties, and yet does not entail the probable delay and lengthy proceeding that would occur with oral argument.

4. Written argument from each party according to a briefing schedule, with no oral argument.

   This is not recommended because the briefing schedule would add at least a month to the time it takes to get a proposed decision to the Board. The rebuttal provided by a briefing schedule may not add significantly to the information and argument the Board has to consider.

5. Written argument from each party submitted to the Board at the same time, with oral argument from both parties at the Board meeting.

   This alternative is not recommended because of the oral argument. All the evidence was presented to the administrative law judge, and so was the oral argument. To permit additional oral agrument defeats much of the purpose of using the administrative law judge. There is a public policy interest to bring litigation to an end and reach a decision without "endless" argument and reargument.

6. Written argument from each party according to a briefing schedule, with oral argument from both parties at the Board meeting.

   This alternative is not recommended for the reasons given in alternative 4 above regarding a briefing schedule, and for the reasons given in alternative 5 above regarding oral argument. This is the least desirable alternative.

7. Oral argument from both parties at the Board meeting, with no written argument.

   This alternative is not recommended for the reasons given in alternative 5 above regarding oral argument.

Therefore, for the reasons expressed above, it is recommended that the Board adopt the interim procedure set forth in alternative 3 as the permanent practice for adoption of proposed decisions.

Staff is available to discuss and provide additional information on this matter.

Gerald Ross Adams
Chief Counsel

Kenneth G. Thomason
Chief Assistant Executive Officer

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September 18, 1985

AGENDA ITEM 18

TO: MEMBERS OF THE BOARD OF ADMINISTRATION

SUBJECT: Board Administrative Hearings

The Standing Committee on Professional Responsibility and Conduct of the State Bar of California has recently issued a ruling that requires a change in the Board's administrative hearing practice. I have enclosed a copy of that ruling, Formal Opinion No. 1984-82, for your information.

The ruling provides that adjudicatory hearings conducted by an administrative agency such as the Board are subject to the limitations upon communications between the adverse parties and the judge or official before whom the proceeding is pending. Rule 7-108(b) of the Rules of Professional Conduct provides that a member of the State Bar cannot directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer except in open court; nor address a written communication without furnishing opposing counsel with a copy thereof.

Thus, neither PERS attorneys and other staff nor opposing attorneys and claimants can communicate with the adminstrative law judge or members of the Board about a case from the time a dispute begins until the Board decides the case except in a manner consistent with Rule 7-108(B). If the communication is oral, both sides must be present or have been given notice of the hearing or meeting at which the oral communication is to be made. If the communication is in writing, a copy of the written communication to the administrative law judge or the Board must also be furnished to the other parties at the same time. The validity of the Board's adjudicatory hearings require adherence to these guidelines and it is in the interest of the claimants and the Board that there be no questions nor delays caused by any procedural defects.

I have recommended the following interim procedure to the Executive Officer for the September 18th and October 16th meetings and will present an agenda item respecting alternative procedures for the Board's consideration at the November meeting.

The Executive Officer has authorized legal staff to contact opposing counsel and claimants and to request their submission of brief written argument to the Board respecting the adoption of proposed administrative law judge decisions which will be submitted together with staff recommendations without any oral presentation by either side. It was determined that insufficient time was scheduled to permit oral argument by all parties at the September and October meetings and that it would be unfair to claimants to postpone their cases until all parties were available for oral presentations. We have assured opposing counsel and claimants that the Board will receive their submittals before staff reviews them and that staff will not make any oral presentations respecting their particular case. The Attorney General's Office has been informed of this interim practice and has stated that it is reviewing the entire matter.

Staff is available to discuss this matter.

Gerald Ross Adams

Gerald Ross Adams, Chief Counsel

Kenneth G. Thomason

Kenneth G. Thomason
Chief Assistant Executive Officer

Attachment

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 1984-82

ISSUE: In an adjudicatory proceeding before an administrative agency, are the hearing officer (administrative law judge), agency head or members of the board or commission constituting the agency "judges" or "judicial officals" within the meaning of rule 7-108(b) of the Rules of Professional Conduct? May an attorney for the interested party or the trial attorney for the agency communicate ex parte with the agency head?

DIGEST: A hearing officer (administrative law judge) should be considered a "judge" within the meaning of rule 7-108(b). While agency heads and the members of the board or commission constituting the agency are not for most purposes "judges" within the meaning of rule 7-108(b), neither the attorney for the interested party nor the trial attorney for the agency should communicate ex parte with the agency head during an adjudicatory proceeding during that period of time when the agency is itself hearing a contested case or when the adoption, modification or rejection or the proposed decision by the hearing officer is pending, except in a manner consistent with rule 7-108(B).

AUTHORITIES INTERPRETED: Rules 7-103 and 7-108 of the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

The Committee has been asked about the propriety, during the pendency of an adjudicatory proceeding before an administrative agency, of ex parte contacts by the trial attorney for the agency with the administrative law judge (hearing officer) before whom the matter is pending or with the agency head upon referral of the hearing officer's decision for adoption, modification or rejection by the agency. Although not expressed, the inquiry presents similar issues concerning ex parte contacts by the attorney for the interested party in the proceeding.

The inquiry to the Committee is limited to administrative proceedings which are clearly "adjudicatory" in nature (for example, license suspensions or other disciplinary proceedings against an agency licensee) and does not extend to rule making and similar quasi-legislative proceedings.1/ While no specific agency was named in the inquiry, for purposes of this opinion it was assumed that the agency and the proceeding are conducted in accordance with the California Administrative Procedure Act (Gov. Code, §11500 et seq.).

1/ See Strumsky v. San Diego County Employees Retirement Association (1974) 11 Cal.3d 28, 34, fn. 2 [112 Cal.Rptr. 805], for a discussion of the distinctions between adjudicatory and legislative determinations by an agency.

Rule 7-108(b) of the Rules of Professional Conduct provides in pertinent part:

> RULE 7-108. CONTACT WITH OFFICIALS.
>
> . . .
>
> (b) A member of the State Bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer except in open court; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. This rule shall not apply to ex parte matters.

This provision is based in substantial part on the American Bar Association's Disciplinary Rule 7-110(B), which is designed to safeguard the fairness and impartiality of a tribunal and the orderliness of its procedures. These rules are also intended to permit an attorney to function effectively while assuring that all litigants and lawyers have equal access without the undue advantage of ex parte communications. (See Heavey v. State Bar (1976) 17 Cal.3d 553 [131 Cal.Rptr. 406,409]; Annotated Code of Professional Responsibility (American Bar Foundation, 1979) at page 376-7.)

Neither rule 7-108(B) nor its ABA counterpart expressly cover administrative proceedings. Nor has any specific authority been found on the application of these rules to adjudicatory proceedings before administrative agencies. Furthermore it must be noted that California rule 7-108(B) differs substantially from ABA Disciplinary Rule 7-110(B) in one respect which is highly material to the present inquiry: while the California rule refers to "judge or judicial officer", the ABA rule refers to the "judge or official before whom the proceeding is pending."2/ The new ABA Model Rules of Professional Conduct are even broader in that the comparable provisions of rule 3.5(b)

2/ ABA Disciplinary Rule 7-110(B) provides:

> (B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
>
> (1) In the course of official proceedings in the cause.
>
> (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
>
> (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
>
> (4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

prohibits ex parte contact with "officials."3/ This narrowing of the rule in California must be read as intentional, although the purpose of the restriction is unclear. In normal parlance among lawyers, a "judge" is a presiding officer of a court of record and a judicial officer is an officer of the judicial (not the executive) branch of government. However, while the specific issue here considered was not addressed, the California Supreme Court in Andrews v. Agricultural Labor Relations Board (1981) 28 Cal.3d 781, 790-794 [171 Cal.Rptr. 590], consistently referred to an administrative law hearing officer under the Agricultural Labor Relations Act as a "judicial" officer. In that case the Court noted that there is no preemptory basis for disqualification of hearing officers similar to Civil Code section 170(5) applicable to judges, and the court refused to hold that "a mere appearance of bias is ground for the disqualification of a judicial officer."

It has been recognized in California that both state and local administrative agencies may exercise judicial power. And in Fremont Indemnity Company v. Workers Compensation Appeals Board (1984) 153 Cal.App.3d 964 [200 Cal.Rptr. 762], the court determined that referees appointed by the Workers Compensation Appeals Board are officers of a judicial system performing judicial functions and are therefore not permitted to initiate ex parte communication with an independent medical examiner. While the Fremont Indemnity decision was predicated upon the fact that the "Workers Compensation Appeals Board is a tribunal of limited jurisdiction, with those powers conferred upon it by the Constitution and the statutes of California . . ." Fremont Indemnity at p. 970 of 153, Cal.App.3d, this statement would also be true of all adjudicatory proceedings conducted under the California Administrative Procedures Act. In holding that the Board, when exercising adjudicatory functions is bound by the due process clause of the Fourteenth Amendment, the court stated that due process requires that:

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal . . ." Fremont Indemnity, at p. 971 of 153 Cal.App.3d.

While Fremont Indemnity did not involve ex parte contact by an attorney with the workers compensation appeals judge appointed to hear the case, the principles enunciated are equally applicable to such contact.

3/ The ABA Model rules of Professional Conduct were adopted by the House of Delegates of the Amerian Bar Association in August, 1983. Rule 3.5 provides:

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

In the context of a proceeding contemplating a license suspension or other discipline of an agency licensee, the role of the hearing officer is directly analogous to that of the "judge" in a court proceeding. A review of the California Administrative Procedure Act, Government Code sections 11500 et seq. makes this point clear. Hearing officers are on the staff of the separate Office of Administrative Hearing and are required to be attorneys admitted to practice for at least 5 years. (Gov. Code, §11502.) The hearing officer presides at the hearing and rules on matters of law. The hearing officer may be disqualified if he or she cannot render a fair and impartial decision. (Gov. Code, §11512.) Oral evidence is taken on oath or affirmation although rules of evidence are not strictly applied. (Gov. Code, §11513.) Decisions must be in writing and must contain findings of fact and a determination of the issues presented. (Gov. Code, §11511.) The hearing officer has the power to administer oaths. (Gov. Code, §11528.) The underlying premise of adjudicatory hearings also supports an analogy to the prinicipl of fairness and impartiality underlying rule 7-108(B). As stated by the Court of Claims, in the course of construing the Federal Aominstrative Procedure Act in Camero v. United States (Ct. Cl. 1967) 375 F.2d 777, 780-781:

> ". . . one of the fundamental premises inherent in the concept of an adversary hearing, particularly if it is of the evidentiary type, is that neither adversary be permitted to engage in an ex parte communication concerning the merits of the case with those responsible for the decision. . . . It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such activity would be to render the hearing virtually meaningless . . ."

Accordingly, while the matter is not entirely clear because of the restrictive wording of the California rule, the Committee believes that a hearing officer (adminstrative law judge) should be considered a "judge or judicial officer" within the meaning of rule 7-108(b) of the Rules of Professional Conduct, and that the underlying policy considerations compel application of the rule to ex parte communication with such officers. The Committee has been informed by the Public Law Section of the State Bar that it is the view of that Section that hearing officers are subject to rule 7-108(B) and in addition consider themselves bound by the Canons of Judicial Ethics. (See also Ruklen, Manual for Administrative Law Judges (U.S. Government Printing Office, 1974) at page 59 ("ex parte communications are improper").)

A much more difficult question is presented with respect to whether the agency head or the members of the board or commission constituting the agency must also be considered "judges or judicial officers" within the meaning of rule 7-108(B). Administrative law and procedures are intended to provide prompt and efficient administration of law in areas where the complexity and highly technical nature of the regulated subject matter often results in quasi-judicial and quasi-legislative authority being vested in an executive agency. In adjudicatory proceedings before an agency, often the alleged violation comes to the attention of the agency which directs its investigators to investigate the facts (often with the assistance of agency attorneys) and, if a violation is believed to have occurred, will authorize the adjudicatory proceeding before a hearing officer or before the agency itself. The parties must be provided with the opportunity to present either oral or written arguments before the agency. (Gov. Code, §11517.) The statute also sets forth various provisions on reconsideration and appeal.

The courts have been very solicitous of the administrative process and very wary of interfering with the internal workings of the administrative process. Thus the agency head has been permitted to adopt the proposed decision of the hearing officer without reading the record. (See Hohreiter v. Garrison (1947) 81 Cal.App. 456 [184 P.2d 323].) In addition, the hearing officer's proposed decision does not have to be served on the interested party before its adoption by the agency. (Compton v. Board of Trustees (1975) 49 Cal.App.3d 150 [122 Cal.Rptr. 493].) The courts have also consistently held that the motives and mental processes of the agency are not permissible areas of judicial inquiry or review. (See City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, 772 [122 Cal.Rptr. 543]; State of California v. Superior Court (1971) 16 Cal.App.3d 87, 94-5 [93 Cal.Rptr. 665], affd. (1974), 12 Cal.3d 237, 258 [115 Cal.Rptr. 497], and cases cited therein.) And due process is not violated by combining in a single agency the function of complainant, prosecutor and judge. (See Hohreiter v. Garrision, supra, and Withrow v. Larking (1975) 421 U.S. 35.)

The Committee believes it would be both an overly broad reading of the California rule and impractical and potentially destructive of the smooth functioning of the administrative process to hold that an agency's heads or the members of the board or commission constituting the agency are for all purposes "judges or judicial officers" within the meaning of rule 7-108(B). Such an interpretation would unnecessarily interfere with the normal working relationship between the agency and its staff attorneys.

Nonetheless, in light of the principles underlying rule 7-108(B) and the considerations of fairness and impartiality outlined above, the Committee believes that, when the agency has elected to have the case heard before the agency itself, the agency head is performing functions equivalent to a judge or judicial officers, and must be considered as a "judicial officer" within the meaning of rule 7-108(B) during the limited period of time when the case is pending decision. Furthermore, if the agency has elected to have the case heard by a hearing officer, rule 7-108(B) applies to communications with the agency head during the limited period of time when the adoption, modification or rejection of the proposed decision of the hearing officer is under consideration.4/ Accordingly, neither the attorney for the interested party nor the trial attorney for the agency should communicate ex parte with the agency head with respect to the case during these periods except in a manner consistent with rule 7-108(B). Similar restraint should be exercised by other staff attorneys for the agency who have been involved in the prosecution of the adjudicatory proceeding. The agency head should rely upon the hearing officer for advice on matters of law, as is apparently contemplated by section 11517.

A final question is presented as to whether the second sentence of rule 7-103 must be read as permitting interested party's counsel to communicate ex parte with the agency head or the members of the board or commission constituting the agency. Rule 7-103 provides as follows:

4/ The same conclusion would be reached, albeit more easily, under ABA Disciplinary Rule 7-110(B) and ABA Model Rule 3.5(B) quoted in footnotes above.

RULE 7-103. COMMUNICATING WITH AN ADVERSE PARTY REPRESENTED BY COUNSEL.

A member of the State bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body. (Emphasis supplied.)

The first sentence of rule 7-103 is based in substantial part on ABA Disciplinary rule 7-104. California courts have observed that rule 7-103 is necessary to the preservation of the attorney client relationship and the proper functioning of the administration of justice. It shields the opposing party not only from an attorney's approaches which are intentionally improper but in addition from approaches which are well intended but misguided. The rule is designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such a role. (See Abeles v. State Bar (1973) 9 Cal.3d 603, 609 and Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal.App.3d 597. See also Annotated Code of Professional Responsibility (American Bar Foundation, 1979) at page 332, citing Formal Opinion 108 (March 10, 1934).) The second sentence of rule 7-103 of the California Rules of Professional Responsibility, however, has no counterpart in the ABA draft rules. Its purpose is to preserve inviolate the right of all citizens to petition their government as protected by the First Amendment to the United States Constitution. (Report and Recommendation of board of Governors Committee on Lawyer Services at pp. 1-3, June 22, 1979, Agenda Item 141 for July 1979 meeting.) The right of petition, however, does not include the right to secret or ex parte communication. (Cf. Fair Political Practices Comm. v. Sup. Ct. (1979) 25 Cal.3d 33, 46-49 [157 Cal.Rptr. 885], upholding reasonable registration and reporting requirements for lobbyists.)

Rule of Professional Conduct 7-103 thence must be harmonized with Rule of Professional Conduct 7-108(B). In doing so, we are guided by the canon of statutory construction that admonishes that statutory schemes should be interpreted in light of each other, and to the extent possible harmonized. (Moyer v. Workman's Compensation Appeals Board (1973) 10 Cal.3d 222.)

When an agency, which has both legislative and adjudicatory function, acts in its judicial function, it is, by definition, acting in a judicial manner. The second sentence of rule 7-103 is aimed not at such function, but rather at preserving the right to petition when an agency acts in its legislative role. When an agency acts in its judicial function, it is not an "adverse party" any more than would be a judge in any court.

In State Bar Formal Opinion 1977-43, we concluded, inter alia, that is is proper for an attorney to discuss on behalf of his client the subject of litigation against a city at a public meeting without first obtaining the consent of the city attorney. We did so on the basis that the city council was not in such public meeting performing an adjudicatory function. Implicit in Opinion 1977-43, however, is what we now make explicit: The second sentence of rule 7-103 does not allow ex parte contact with a public agency when that public agency is performing its adjudicatory, i.e. judicial function.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of The State Bar of California. It is advisory only. It is not binding upon the courts, The State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.